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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE DENVER UNION STOCK YARD COMPANY, *Petitioner*,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

WINSTON S. HOWARD
320 Equitable Building
Denver 2, Colorado

ASHLEY SELLERS
ALBERT L. REEVES, JR.
JOHN D. CONNER
JESSE E. BASKETTE
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

I. The Respondent Improperly Seeks a Judicial Determination as to the "Reasonableness" of the Petitioner's Regulation Upon a Record Devoid of Facts and in the Face of an Administrative Conclusion That Facts Are Essential to Such Determination 1

II. In Particular, the Respondent Indulges in Erroneous Assertions Concerning Its Status and the Effect of Petitioner's Regulation on the Patrons of the Denver Stockyards 3

III. The Respondent Misstates to This Court That the Petitioner Elected to Have the Validity of Its Regulation Determined Without a Hearing on the Facts 9

Conclusion 14

CITATIONS

CASES:

Acker v. *United States*, 298 U.S. 426, 428 6
Chicago Board of Trade v. *United States*, 246 U.S. 231, 238 2
Chicago, St. Louis and New Orleans R. Co. v. *Pullman Southern R. Co.*, 139 U.S. 79, 89-90 7
Eccles v. *Peoples Bank*, 333 U.S. 426, 432 .....13, 14
The Express Cases, 117 U.S. 1, 24 7
First National Bank v. *Beach*, 301 U.S. 435, 438 .. 14
Midwest Farmers v. *United States* (D. Minn.), 64 F. Supp. 91, 95 4
Stafford v. *Wallace*, 258 U.S. 495, 516 6
Swift & Co. v. *Hocking Valley R. Co.*, 243 U.S. 281, 289 9
Tagg Bros. v. *United States*, 280 U.S. 420, 437 6
Tagg Bros. v. *United States* (D.C. Neb.), 29 Fed. 2d 750, 752, affirmed 280 U.S. 420 6
United States v. *Corrick*, 298 U.S. 435 6

AGRICULTURE DECISIONS: Page

In Re Producers Livestock Marketing Association and Western Order Buyers, 14 Agr. Dec. 109 7
Gilbert R. Smith v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597 5

STATUTES:

Hobbs Act (64 Stat. § 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV), § 1031 *et seq.*) 3
Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 1952 ed. § 181 *et seq.* 2
§ 301(b) (7 U.S.C. 1952 ed. § 201(b)) 4
§ 301(c) (7 U.S.C. 1952 ed. § 201(c)) 3
§ 303 (7 U.S.C. 1952 ed. § 203) 5
§ 310 (7 U.S.C. 1952 ed. § 211) 9

REGULATIONS:

Regulations and Rules of Practice under the Packers and Stockyards Act:
9 C.F.R. § 201.61(a) 6
9 C.F.R. § 201.79(b) 5

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REPLY BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

We desire to reply to the arguments of the respondent in its brief in three respects:

I.

The Respondent Improperly Seeks a Judicial Determination as to the "Reasonableness" of the Petitioner's Regulation Upon a Record Devoid of Facts and in the Face of an Administrative Conclusion That Facts Are Essential to Such Determination.

The respondent ignores the real issues and, instead, seeks to have this Court affirm a determination by the Court of Appeals concerning the validity of the petitioner's regulation made upon a record barren of facts.

To this end, the respondent makes factual statements throughout its brief concerning the purpose, operation, and effect of the petitioner's regulation. The respondent even purports to quote a statement of the petitioner concerning the effect of the challenged regulation although no such statement was ever made by the petitioner (Respondent's brief, top of page 3). All of these statements by the respondent were denied by the petitioner in its pleadings in the administrative proceeding (R. 44). No factual hearing was held respecting the issues thus joined, solely because of the respondent's refusal to attend such a hearing and to prosecute its claim that the regulation is invalid because it is "unreasonable" (R. 72), which is the governing standard under the Packers and Stockyards Act (42 Stat. § 159, as amended, 7 U.S.C. 1952 ed. § 181 *et seq.*) by which the regulation must be tested. This Court frequently has pointed out the necessity of factual hearings to resolve issues as to the "reasonableness" of important industry regulations in the light of their purpose, operation, and effect. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238. Clearly, unfounded and untruthful assertions by the respondent furnish no basis for a judicial determination of the validity of petitioner's regulation.

The respondent has not attempted to meet the real issues presented to this Court. These issues are whether the Court of Appeals was correct in holding in this case that the submission of evidence is not necessary to constitute the "hearing" required by law; that all evidence as to the reasonableness of the regulation is immaterial—no matter by whom presented; that, as applied to hypothetical facts not in the record but conjectured by the court below, the regulation is in-

valid in its entirety; and that the court was authorized to invade the discretion of the Secretary by directing the Judicial Officer as to the type of administrative order to be entered.

The court below was not called upon to determine the validity of the challenged regulation, because the Judicial Officer specifically did not pass upon that issue. The simple question before the lower court was whether the Judicial Officer's decision to dismiss the administrative proceeding was proper in view of the respondent's refusal to submit any evidence as to the "unreasonableness" of the challenged regulation.

In view of the incredible action of the court below, the only issues now before this Court are correctly set forth in our main brief and raise the question whether the Court of Appeals properly performed its function as a reviewing court under the Hobbs Act (64 Stat. § 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV), § 1031 *et seq.*).

II.

In Particular, the Respondent Indulges in Erroneous Assertions Concerning Its Status and the Effect of Petitioner's Regulation on the Patrons of the Denver Stockyards.

The respondent relies heavily upon its mistaken notion that it is a patron of the petitioner's market. But the respondent is not in the position of a patron of the Denver stockyard. The patrons—the shippers and buyers of livestock—are not denied stockyard services under any circumstances because of the challenged regulation and the regulation is not even applicable to the patrons.

The respondent has only the status of a "market agency"[1] at that stockyard and, as such, is merely one

[1] Section 301(c) of the Act, 7 U.S.C. 1952 ed. § 201(c).

of the instrumentalities through which "stockyard services"[2] are furnished by the petitioner at the stockyard to the patrons of the market, particularly selling and buying services.

The respondent has no inherent right to perform selling and buying services as a market agency at the Denver stockyard. The Denver stockyard is not operated for the benefit of such market agencies but, rather, it is operated for the benefit of the sellers and buyers of livestock who desire to avail themselves of the services offered at the stockyard. Market agencies can be permitted to operate at the Denver stockyard only if their operations are compatible with the best interests of all of its patrons.

To preserve the best interests of the patrons of a stockyard in the selling and buying process, it is necessary for the market agencies through which such selling and buying services are furnished to devote themselves to the interests of their principals. *Midwest Farmers* v. *United States* (D. Minn.), 64 F. Supp. 91, 95.

In its pleadings filed in the administrative proceeding, the petitioner alleged that it issued its regulation to make it possible for its patrons to receive the reasonable selling and buying services at the Denver stockyard to which they are entitled (R. 46). Further, the petitioner was prepared to submit proof to this effect at a factual hearing, and would have done so except for the circumstance that the respondent refused to appear at such hearing and prosecute its charges concerning the "unreasonableness" of the challenged regulation.

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[2] Section 301(b) of the Act, 7 U.S.C. 1952 ed. § 201(b).

A market agency, such as the respondent, may not even begin to do business at a stockyard subject to the Act without first registering with the Secretary, as provided in § 303 of the Act (7 U.S.C. 1952 ed. § 203). Even after it has registered as a market agency with the Secretary, a market agency, such as the respondent, may not operate, as of right, at the stockyard. It must also secure the permission of the stockyard owner, such as the petitioner, and agree to abide by the regulations of the owner designed to make it possible for the patrons of the stockyard to receive reasonable stockyard services. It is the settled administrative practice under the Act that

> "* * * Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business * * *." (*Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597).

Under his general regulations, the Secretary has specified many factors which a stockyard owner may take into consideration in deciding whether to permit a given person to operate as a market agency at a stockyard. For example, it is provided, *inter alia*, that a stockyard owner shall not assign facilities to a particular market agency at a stockyard if the operation of such market agency would ". . . impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market" (9 CFR § 201.79(b)). Also, the Secretary has, himself, provided that no market agency shall enter into any relationship ". . . which might have a tendency to lessen the loyalty of the market agency to its consignors

or impair the quality of the market agency's selling services . . ." (9 CFR § 201.61(a)).

This Court has also recognized the true status of a market agency, *viz.*, that it is a mere instrumentality at a stockyard through which services are furnished to the patrons of the market and that the market agency is not, itself, a patron. *Stafford* v. *Wallace*, 258 U.S. 495, 516; *Tagg Bros.* v. *United States*, 280 U.S. 420, 437; *Acker* v. *United States*, 298 U.S. 426, 428; and *United States* v. *Corrick*, 298 U.S. 435. Indeed, as *Stafford* v. *Wallace*, *supra*, so aptly shows, one of the chief reasons for the passage of the Packers and Stockyards Act was to control the activities of market agencies and dealers at the public stockyards which were making it impossible for the patrons of those stockyards to secure the reasonable stockyard services to which they were entitled.

> "* * * The gist of the business is no different because the public stockyards company assigns and turns over the use of its public facilities to the [market] agencies for the performance of their function, and lets them carry on the marketing in the yards. * * *". (*Tagg Bros.* v. *United States* (D.C. Neb.), 29 F. 2d 750, 752, affirmed 280 U.S. 420).

The history of regulation under the Act demonstrates the necessity of continuing supervision of the activities of market agencies at public stockyards if the best interests of the patrons of stockyards are to be preserved. For example, only recently, this very respondent was the subject of disciplinary action by the Secretary to prohibit it and its officers from engaging in actions detrimental to the interests of stockyard

patrons. *In Re Producers Livestock Marketing Association and Western Order Buyers*, 14 Agr. Dec. 109.

The relationship of a stockyard company and of a market agency is similar, in many respects, to that of a railroad company and an express company. In *The Express Cases*, 117 U.S. 1, 24, this Court held that a railroad has a duty to furnish the public reasonable express service but that it owes no duty to the public as to the particular agencies it may select for that purpose. Such service may be furnished by the railroad through its own employees or it may select one or more express companies whose employees will furnish the service. The railroad is not a "common carrier" of express companies. They have no right to use the facilities of a railroad. See, also, *Chicago, St. Louis and New Orleans R. Co.* v. *Pullman Southern R. Co.*, 139 U.S. 79, 89-90.

So, in the stockyards industry, while a stockyard company has a duty to furnish services for the buying and selling of livestock, it may perform this duty through other instrumentalities or "market agencies" which, also, are then required by law to render reasonable stockyard services—but this does not relieve the stockyard company from its duty to see to it that reasonable stockyard services are furnished the farmers and shippers and buyers who constitute the patrons of the stockyard.

Respondent does not, therefore, wear the mantle of a patron of the Denver stockyard. For this reason alone, the respondent's reliance upon authorities dealing with the duties of public service companies to their patrons is misconceived.

Actually, no patron[3] of the Denver stockyard would be denied stockyard services because of the challenged regulation. Such regulation is applicable solely to the respondent and to other market agencies engaged in performing services at the stockyard for the patrons of the market. All of the activities proscribed by the regulation in so far as it is challenged herein are activities of market agencies—not activities of shippers and buyers of livestock; and obviously, the validity of the regulation as applied to the respondent depends upon the "reasonableness" of the regulation considered in the light of the facts relative to the livestock marketing process at the Denver market and relative to the functions which market agencies are supposed to perform in that process. The record now before the Court contains no such facts.

Thus, even if the issue as to the validity of the petitioner's regulation were ripe for consideration by

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[3] Since the respondent refused to present evidence at a factual hearing, there is nothing in the record to indicate how the respondent is organized or operates as a cooperative organization. But, in any event—contrary to the assertions of the respondent in its brief—, the shippers and buyers of livestock who may belong to the respondent would not be denied stockyard services by the petitioner under any circumstances. They, like all of the other patrons of the Denver stockyard, will always be furnished with reasonable facilities for the sale and purchase of their livestock at the Denver market if they so desire. Obviously, however, no patron may insist that such services and facilities be furnished to it in any particular manner or by any particular means, and this is especially so if such manner or means makes it impossible for the patrons of the stockyard, as a whole, to receive the reasonable stockyard services to which they are entitled. Moreover, there is no statutory requirement that the stockyard company must differentiate in its regulations between market agencies which are organized as cooperative marketing associations and those which function through any other form of business entity.

this Court, there would be no merit to the respondent's arguments that it is a patron of the Denver stockyard or that the challenged regulation imposes unlawful restrictions upon the furnishing of services to the patrons of the Denver stockyard.

III.

The Respondent Misstates to This Court That the Petitioner Elected to Have the Validity of Its Regulation Determined Without a Hearing on the Facts.

The petitioner never elected to have the validity of its challenged regulation determined solely as a matter of law and without a consideration of the facts; nor does the petitioner agree with the respondent that this might be done.

Even if the parties in the administrative proceeding had so agreed, the Secretary would not be bound by such an agreement in view of the "hearing" provision of § 310 of the Act (7 U.S.C. 1952 ed. § 211). The Judicial Officer decided that a factual hearing, which the respondent refused to attend, was an indispensable prerequisite to resolve the issues raised by the pleadings in the administrative proceeding (R. 32). See *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U.S. 281, 289).

Aside from this, the respondent has simply misstated to this Court the petitioner's position respecting the necessity of a hearing.

The principal position of the petitioner throughout all of these proceedings has been that, in view of the "hearing" requirement of § 310 of the Act (7 U.S.C. 1952 ed. § 211), the Secretary can not declare its regulation either "reasonable" or "unreasonable" without consideration of the facts concerning its purpose,

operation, and effect.[4] A brief reference to the facts of record will make this clear.

In the administrative proceeding, the Hearing Examiner issued a ruling (after an application by the petitioner for a *subpoena duces tecum*), in which he held that a hearing on the facts was required to determine the "reasonableness" or "unreasonableness" of the regulation; and he indicated that he would issue the requested *subpoena* after the respondent, who was the complainant in the administrative proceeding and had the burden of proof, had presented its evidence (R. 70-71). Immediately, the respondent filed an "Election to Rest," stating that it would "not present evidence in this cause as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter or law" (R. 72).

The petitioner then moved to dismiss the administrative proceeding. But the motion to dismiss was not predicated upon the petitioner's willingness to have the validity of its regulation decided as a matter of law without the consideration of facts. On the contrary, such motion was based entirely upon the respondent's failure to proceed as directed by the Hearing Examiner and as required by the law (R. 73). The Hearing Examiner so understood the motion of the petitioner. He agreed that, because of the respondent's failure, the proceeding should be dismissed, and, accordingly, certi-

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[4] Even apart from the statutory requirement for a hearing on the facts, practical considerations preclude the Secretary from determining the "reasonableness" or "unreasonableness" of stockyard regulations unless the Secretary has an opportunity to ascertain and study the facts upon which "reasonableness" depends. The Secretary is not omniscient although the Court of Appeals evidently thought he should be.

fied the case to the Judicial Officer, recommending that it be dismissed (R. 73).

There is thus nothing whatever in the record to support the respondent's representation to this Court that the petitioner "conceded an evidentiary hearing was unnecessary" (Respondent's brief, p. 7), or that "The Hearing Officer conceded an oral hearing was no longer necessary" (Respondent's brief, p. 13) in order to test the validity of the regulation. Indeed, in his certification to the Judicial Officer (R. 73), the Hearing Examiner specifically referred to his prior ruling that a hearing on the facts would be necessary in order to determine the "reasonableness" or "unreasonableness" of the regulation (R. 70-71).

The Judicial Officer also referred to the petitioner's motion as a motion to dismiss "because of the [respondent's] failure to prosecute the proceeding by making out a prima facie case" (R. 11). Elsewhere he stated that it was "based upon the [respondent's] election not to adduce evidence at a hearing following the hearing examiner's ruling that the disputed regulation was not invalid on its face and that a hearing upon the facts was necessary" (R. 15).

The Judicial Officer considered the issues presented to him. One of these was the respondent's contention that the challenged regulation was invalid on its face as a matter of law and the other was the petitioner's contention that, upon the record before him, the Judicial Officer would not be warranted in holding the challenged regulation invalid. The Judicial Officer upheld the ruling previously made by the Hearing Examiner to the effect that the validity of the regulation could not be determined as a matter of law and in the absence of a hearing on the facts (R. 32).

The Court of Appeals also understood that both the petitioner and the Judicial Officer were of the view that a factual hearing was necessary and that the petitioner had never waived such a hearing. In this connection the Court of Appeals said:

> "* * * At the hearing set before the judicial officer of the Department of Agriculture [respondent] elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law, illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon [respondent] and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application * * *" (R. 80).

Elsewhere, the Court of Appeals said:

> "It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a 'full hearing' with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations, 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(c) was reasonable and necessary to prevent market agencies in the position of [respondent] from undermining the business and public efficiency of the yard by the solicitation of business for other yards" (R. 81).

Thus, neither the Hearing Examiner, the Judicial Officer, nor the Court of Appeals understood that the petitioner had agreed with the respondent to waive a

hearing on the facts. The case was decided below upon a contrary basis.

Indeed, the Court of Appeals felt compelled to consider at length the hearing requirement of the law, holding that the "submission of evidence is not required" to constitute a "full hearing" under the Act and that the requirement had been satisfied by "according the parties the right of argument" merely on legal issues (R. 81-82). The lower court then proceeded to declare the regulation invalid but that court did not simply hold the regulation invalid on its face as a matter of law. Instead, the real basis of the decision by the Court of Appeals was that the regulation would be invalid, in that court's view, as applied to a hypothetical factual situation conjectured by that court (R. 82) which finds no support in the record. This constitutes error by the lower court requiring reversal (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432), as we have shown in our main brief.

Seeking further to justify its contention that petitioner's regulation may be declared invalid as a matter of law in the absence of a factual hearing, the respondent enumerates various fanciful factual situations and suppositions—including such imaginary regulations as those dealing with red-headed men—and asserts that such regulations by a stockyard company might properly be declared invalid without a hearing (Respondent's brief, pp. 46-53).

The short answer to all of this is that the petitioner's challenged regulation, on its face, has no application to such fancied factual situations conjectured by the respondent. This Court has repeatedly made it clear that it is improper for a court to depart from the con-

crete case before it (*First National Bank* v. *Beach*, 301 U.S. 435, 438), or to give advisory opinions as to constitutional issues or even issues short of constitutionality (*Eccles* v. *Peoples Bank*, 333 U.S. 426, 432) which are not immediately necessary for purposes of decision. These principles are especially applicable where, as here, in a carefully considered decision, the Judicial Officer refrained from passing upon the validity of the regulation, declaring that facts are essential to such a determination.[5] It will be time enough to consider the imaginary cases discussed by the respondent if they ever arise.

CONCLUSION

In order to uphold the contentions of the respondent it would be necessary for this Court to reject all of the principles which it has heretofore established with regard to the proper alignment of functions between administrative agencies and those of courts charged with reviewing administrative decisions. Clearly, the Court of Appeals ignored these principles, for the reasons which we have shown in our main brief, and

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[5] The Judicial Officer, of course, had no authority to require the respondent to rely upon any position other than that which it did. The dismissal of the complaint by the Judicial Officer did not affect the Secretary's own jurisdiction thereafter to hold a factual hearing on his own motion, or upon a fresh complaint of another party, if such were deemed proper, concerning the regulation. But the Court of Appeals has precluded the Secretary from carrying out his administrative responsibilities in this respect, since that Court declared the entire regulation invalid and directed the Secretary also to issue such a declaration without further hearing. Only a reversal of the judgment of the lower court will enable the Secretary to perform his duties.

the public interest imperatively demands that its judgment be reversed.

Respectfully submitted,

WINSTON S. HOWARD
320 Equitable Building
Denver 2, Colorado

ASHLEY SELLERS
ALBERT L. REEVES, JR.
JOHN D. CONNER
JESSE E. BASKETTE
1625 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner